

ADDITIONAL CIRCUIT AND DISTRICT JUDGES IN CERTAIN CASES.

JANUARY 27, 1916.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. CARAWAY, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 61.]

The Committee on the Judiciary, having had under consideration a bill (H. R. 61) to amend section 260 of the Judicial Code, report the same to the House with the recommendation that the bill do pass.

A bill proposing similar legislation was before the Sixty-third Congress, with the unanimous recommendation of the Committee on the Judiciary of that Congress. It was, however, never taken up and acted upon.

Mr. Attorney General James C. McReynolds, now Justice of the Supreme Court of the United States, in his report, dated December 1, 1913, makes the following recommendation:

1. Judges of United States courts, at the age of 70, after having served 10 years, may retire upon full pay. In the past many judges have availed themselves of this privilege. Some, however, have remained upon the bench long beyond the time when they were capable of adequately discharging their duties, and in consequence the administration of justice has suffered. The power of Congress to correct this condition is limited by the provision of the Constitution that judges shall hold their offices during good behavior. I suggest an act providing when any judge of a Federal court below the Supreme Court fails to avail himself of the privilege of retiring now granted by law, that the President be required, with the advice and consent of the Senate, to appoint another judge, who shall preside over the affairs of the court and have precedence over the older one. This will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court.

Mr. Attorney General Gregory renewed these recommendations in his report dated December 7, 1914. He again renewed these recommendations in his report dated December 6, 1915, with the modification that while in the former recommendation it was provided that the President be "required" to appoint, with the advice and consent of the Senate, another judge, etc., in the last report it is recommended that he "be authorized," with the advice and consent of the Senate, to appoint, etc.

The bill carries out the provisions of the recommendation, with the exception that it provides that the President, "if in his opinion the public good so requires, may appoint, by and with the advice and consent of the Senate, an additional circuit judge," etc., and repeats the same language with regard to the right to appoint an additional district judge.

The bill as thus drawn does not require the President to appoint such additional judge in all cases where the judge has held his commission for 10 years and reached the age of 70, but empowers him to do so only when he finds that the public good requires it.

Some of the circuit and district judges are still vigorous at the age of 70 and do the work of their office. In such a case the President would not find that the public good required the additional judge. If, however, he is not so vigorous at this age, he is still permitted by this bill to remain in office, but be relieved from the weight of the work that is required by the office. Under the present law such a judge is allowed to retire on full pay. The bill is designed to cure the evil spoken of in the reports of the Attorney General where such judge does not retire and is too old and infirm to do the work required for the proper administration of justice.

Mr. VOLSTEAD submitted the following

MINORITY REPORT.

This bill if enacted into law would be an unnecessary and unwise departure from a long-established policy. It is an attempt to evade, if not a direct violation of the Constitution of the United States. It, in effect, gives to the President power to remove all circuit and district judges that have served 10 years and attained the age of 70 if "in his opinion public good so requires."

The Constitution provides that "the judges both of the Supreme and inferior courts shall hold their offices during good behavior." The office of a judge is to decide legal controversies arising within a certain district. His office is coextensive with his jurisdiction and the territory over which he presides. The office of judge of the various districts and circuits is to continue unchanged under this bill but the functions of the judges affected, their jurisdiction, are to be exercised by new judges appointed, as the bill says, to "relieve" them. The release from duty is not optional with these judges, as it is expressly provided that the new ones shall perform their duties. The judges that are to be relieved are not to perform any of the functions of judges unless assigned thereto by some other judge, and that only in case some exigency requires an additional judge. They are to have no control over the business of the district, and when they die or retire no new judge shall be appointed to fill the vacancy. How can it be said that judges who are thus deprived of their powers do, in the language of the Constitution, "hold their offices"? It would seem idle to argue that these judges do continue to "hold their offices" because they are not entirely shorn of power, but may for certain purposes serve as judges. If their powers can be taken from them to the extent proposed by this bill, what shall prevent taking from them all powers. The bill in effect provides for the removal of the judges entitled to retire and makes of them mere shadows of a judge.

That this constitutional provision is mandatory is plain from its language. Justice Story in the case of *Martin v. Hunter* (1 Wheaton, p. 328), speaking of this constitutional provision, uses this language:

The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior. * * * Could Congress create or limit any other tenure of the judicial office? * * * But one answer can be given to these questions. It must be in the negative.

This bill certainly does attempt to limit the tenure of these judges. It is not necessary to argue that a finding by the President that the public good requires the removal of a judge does not warrant removal. Good behavior is good moral conduct. A judge may be exemplary in that respect both on the bench and in his private life, still under this bill it is in effect provided that he may be removed from his office. The framers of the Constitution sought to protect

the Federal judiciary against this class of legislation. They were careful to provide but one ground for removal. They no doubt anticipated that the exigencies of party politics might make the tenure of a judge insecure if he could be removed simply because some one thought the public good might require that a judge be relieved to make place for some deserving partisan. If the President should find that a judge affected by this bill held views that in his opinion were opposed to the public interest, he might remove him and install another in his place. We have had instances in our history when the exercise of such a power would have been strenuously demanded by a large section of the public.

This legislation can not be justified upon the ground that in some districts superannuated judges have refused to retire under existing law. Many judges at the age of 70 are not only able to discharge their duties but are men of exceptional ability. In not a few instances men not entitled to retire have been physically incapacitated. If this bill is to adopt a fair policy, it should apply not only to those that may retire but to all whose removal may in the opinion of the President be for the public good.

This bill is a surrender of a long established policy. Congress must under the Constitution provide courts. This power carries with it the duty of determining to what extent courts are necessary. In the past Congress has insisted that when a new judge is appointed that appointment should first be authorized by an act passed for that purpose. This bill is an attempt to delegate to the President the power to determine to what extent additional judges and courts are necessary. There is no good reason why a district suffering for lack of judges should not in the future, as in the past, apply to Congress for relief. The only reason that can be suggested is the difficulty in securing relief through Congress. Congress has always been liberal in providing additional judges, but before it will provide for another judge it insists upon knowing that there is some necessity for the additional expenditure that such an appointment always entails. Under this bill one judge could not be made to serve as judge in two districts, while Congress may by an act provide relief by adding one judge where two are now serving, thus saving the expenses incident to an additional judge.

Not only is this bill in contravention of the Constitution but it would adopt a vicious and dangerous policy, one that, if made effective as applied to the judges who may now retire, would no doubt in time be applied to all judges. Such a law if valid would make the judiciary absolutely dependent on the will of the Executive. It is the duty of Congress to guard the Public Treasury. This bill gives the President power to obligate the Treasury for the salary and other expenses of judges that Congress and not the President should authorize. This bill should not pass.

VIEWS OF MR. GRAHAM.

I do not approve of the policy in this bill, and doubt its constitutionality.

GEORGE S. GRAHAM.





CLOSING FORTY-FIRST STREET NW.

JANUARY 27, 1916.—Referred to the House Calendar and ordered to be printed.

Mr. JOHNSON of Kentucky, from the Committee on the District of Columbia, submitted the following

REPORT.

[To accompany H. R. 9.]

The Committee on the District of Columbia, to whom was referred H. R. 9, a bill authorizing the closing of part of Forty-first Street NW. in the District of Columbia, having considered same, report it back to the House with the recommendation that it pass with the following amendment:

Page 1, line 13, strike out the word "educational" and insert in lieu thereof the word "charitable."

The Commissioners of the District of Columbia were authorized to close a part of Forty-first Street by an act entitled "An act to authorize the closing of a part of Forty-first Street northwest, in the District of Columbia, and for other purposes," approved April 8, 1910. The bill (H. R. 9) in message, authorizes the closing of the street. There is, strictly speaking, never been any paving of the closing of this street

